IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JANET AVILES, Plaintiff, v. BAE SYSTEMS NORFOLK SHIP REPAIR, INC., AND BAE SYSTEMS SHIP REPAIR, INC., Defendants.	)	CRIMINAL ACTION NO. 2:16cv58

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

November 6, 2017

BEFORE: THE HONORABLE ROBERT J. KRASK
United States Magistrate Judge

APPEARANCES:

FRIEDMAN & HOULDING, LLP
By: Giselle B. Schuetz
Counsel for the Plaintiff

PAUL HASTINGS JANOFSKY & WALKER LLP
By: Carson H. Sullivan
Counsel for the Defendants

(Hearing commenced at 11:04 a.m.)

THE CLERK: Janet Aviles v. BAE Systems Norfolk Ship Repair, Inc., et al., case 2:16cv58.

Are counsel ready to proceed?

MS. SCHUETZ: Yes.

MS. SULLIVAN: Good morning, Your Honor. I'm Carson Sullivan for the defendants. With me is Marcy Cornfield from BAE. How would you like to proceed?

THE COURT: Yes. So this Court, even though I tend to be a little less formal than perhaps some of the judges, things are rather formal here. So you stand when you address the Court, and you make your argument from the podium.

MS. SULLIVAN: Great. Did you want to introduce yourself?

MS. SCHUETZ: Sure.

Your Honor, I'm Giselle Schuetz here for the plaintiff.

THE COURT: Very well. Good to see you, Ms. Schuetz. Give me just one moment to get set up, and then we will start with counsel for BAE.

Okay, Ms. Sullivan. Sorry about that. You ready to go?

MS. SULLIVAN: Yes. Thank you, Your Honor. Can you hear me okay?

THE COURT: I can.

MS. SULLIVAN: Is it too loud?

THE COURT: You can pull that down a little bit if you'd like.

MS. SULLIVAN: All right. Again, Carson Sullivan. Thank you for hearing us today. These are on defendants' motions to compel on the privilege issues, which I know you're aware of them. It's EFC 42, 43 and 46, are where our motions start.

Just a brief background. I know that we have covered it in our papers, but the crux of why we are here is because on February 11th, 2015, plaintiff's treating physician took her out of work, said she was unsafe to work in the shipyard environment. BAE, relying on the doctor's medical opinion, informed Ms. Aviles, through her counsel, that she was going to be placed on a disability leave. She has remained on leave. She has not been reinstated.

She filed suit against BAE making multiple claims, Title VII, that she was retaliated against for participating in a previous class action that had since been settled, and violation of Title VII because of her sex, that she has been treated differently than other males in the shipyard, and also violation of the ADA.

THE COURT: You said "she," is she still on disability at this time?

MS. SULLIVAN: She is, yes, and she is receiving workers' compensation benefits.

So the problem with this is that the plaintiff, over three months after she was put out of work, she signed a full release. We reached an agreement in the class action lawsuit, but there was also a supplemental release, which is kind of a typical for named plaintiffs and class representatives where she signed a supplemental release, not just releasing the claims in the lawsuit but all claims, and that was on May 18th, 2015. She was paid substantial consideration for that supplemental release. Again, that was on May 18th she released all known and unknown claims.

She then filed suit against BAE alleging claims that we believe were clearly released. We initially filed a motion to dismiss -- I think that is ECF number 8 -- where we moved to dismiss the initial complaint in its entirety. She did not respond to that motion and, instead, filed an amended complaint. The amended complaint, I think, is ECF number 19.

In that she -- and I have a comparison document, you know, where you can do a redline and see -- she added some very specific allegations about her knowledge and her counsel's knowledge and beliefs and conclusions.

THE COURT: I'm aware of the three paragraphs. Just in your estimation, and I haven't held them side by

side, but I know there is some mixing up and movement of some of the paragraphs, but how much additional information is contained in the amended complaint?

MS. SULLIVAN: I have one copy of this. I'm happy to e-mail it to you afterwards. All it is, is a comparison of the two. I think that other than those, there might have been one other paragraph that was added to the complaint. I have it here, but those were the main ones, and those are the ones that we believe are at issue here. To the amended complaint we filed a motion to dismiss, and they opposed that, obviously, with briefing.

The paragraphs at issue are Paragraph 31, Paragraph 37 and Paragraph 67. In them, in Paragraph 31 states, "Mr. Friedman" -- that is counsel for the plaintiff -- "accepted Ms. Sullivan's" -- that's me -- "representations that BAE was not acting in bad faith or on account of Ms. Aviles' protected activity and the representation that should the agreed doctor opine that Ms. Aviles could work safely, she would be allowed to return to work."

Now, I'm going to try very hard not to interject my opinions of the merits.

THE COURT: That would be good. Advisable unless you want to get out of the case.

MS. SULLIVAN: No, not going to do that. But the pleading is Mr. Friedman accepted, and that is in Paragraph

31. In Paragraph 37, quoted directly from the complaint, "On May 18th, 2005, Ms. Aviles and her counsel reasonably believed, based on written and verbal representations of BAE's counsel that BAE was engaged in a good-faith process, that would result in her return to work." That is May 18th, the day she signed the release.

In Paragraph 67, "After May 21st, Mr. Friedman concluded that BAE had acted to exclude plaintiff from the shipyard because of her protected activity, and that its willingness to reinstate her based on Dr. Gershon's opinion had been a charade, intended to conceal its motive."

THE COURT: Let me ask you about those three paragraphs. Certainly, one of the questions I have is how do such of these paragraphs disclose or describe attorney-client communications?

Now, they certainly reference Mr. Friedman's state of mind with respect to acceptance, belief and conclusions that he may have reached as discussed in those paragraphs, but how do they disclose or describe attorney-client communications?

MS. SCHUETZ: Well, I think that your point that you said, is that they rely on her state of mind, which is exactly what we are arguing here. They don't say he told her that, but in effect what they have done is they have used this as a sword to overcome the motion to dismiss, his

conclusions, his reasonable beliefs, that they have used that to overcome the motion to dismiss.

Now they are trying to shield the reasons behind it and the communications behind it, which we believe will show absolutely that they were aware that there was cause of action when Ms. Aviles signed the release and Mr. Friedman recommended that she sign the release.

By being deprived of that information, we are essentially back at where we started with the motion to dismiss, because Judge Allen stated in her opinion -- and let's see. She said, "Plaintiff alleges that when she signed the agreement, defendants were 'engaged in a good-faith process, that would result in plaintiff's return to work,' Am. Compl. 6, ECF 19. However, after signing the agreement, plaintiff came to believe that defendants' willingness to reinstate plaintiff 'had been a charade, intended to conceal its motive.'" She cites exactly to the paragraph that they added that referred to Mr. Friedman's state of mind, his conclusions, and his beliefs.

So that is why we believe there is a waiver of the attorney-client privilege and the work-product doctrine there. The case law is, and I will go through a few of the cases. It is about -- you know, an analogy would be the defense, you know, the advice of counsel defense, very similar. Of course, this isn't a defense so it's a little

different, and you're not always going to find the exact scenario here, but we believe that's exactly what they're doing.

In fact, some of the cases they don't call it the advice of counsel issue; they call it the at-issue. You put something at issue in a case, and then you deprive the other side of the ability to get discovery on it. Now, Judge Allen said in her opinion, "In sum, plaintiff contends that the claims asserted in her amended complaint did not yet exist when she signed the release. At this stage, the Court must assume plaintiff's alleged facts are true and draw all reasonable inferences in her favor. Accordingly, the Court is compelled to deny" the motion to dismiss.

I feel like -- I know we are right back to where we were because we asked very targeted discovery on those paragraphs. We are not claiming a subject matter waiver of everything in the case, but we asked targeted discovery on that, and we asked targeted deposition questions, and all of them have not been answered on the reliance of the attorney-client privilege or the work-product doctrine.

THE COURT: Let me ask you about that. So what is outcome determinative here is when these claims accrued, correct?

MS. SULLIVAN: Yes.

THE COURT: Isn't the law in the Fourth Circuit, in

essence, that what the Court has to consider is when the plaintiff knew or reasonably should have known of an adverse employment action by the defendant? Presumably, if she knew or reasonably should have known on or before May 18th, then you have your contract argument that she entered into a binding agreement and waived those claims. If she didn't know or reasonably should not have known prior to that date, then arguably she has such claims. Would you agree with that?

MS. SCHUETZ: That's exactly right, Your Honor. Our position would be that the adverse action occurred on February 11th -- well, actually, February 12th was her first day out of work. She obviously knew she was out of work then.

THE COURT: But what I'm getting at is what's in her mind. She knew or reasonably should have known. I guess the question I have is, then, so that the other predicate to discovery is relevance. At least part of the Court's concern is why is it relevant that Mr. Friedman thought something or believed something or accepted something unless it touches upon informing her state of mind?

MS. SULLIVAN: Right, and then that's what I was saying. If we didn't have this whole side issue of the release and all of that, I think it would be clear that the

adverse employment action happened when she was taken out of work. But, yes, she had not answered questions about why she signed the release on May 18th, even though she hadn't been put back to work. She said she relied on advice of counsel, and there's been -- we have no evidence, and we have nothing from Mr. Friedman -- you know, every question surrounding it he has -- his counsel objected to any of that.

So we have no way of proving what we are fairly -- very certain to be the case that he knew there were causes of action and that she knew there were causes of action, or if she did not, then it is because he did not tell her something happened there. But the case law -- I mean, there is cases in the Fourth Circuit. There is a case that we cited in our motion to dismiss that is very on point. It's not Fourth Circuit. I think it's Third Circuit from 2004.

THE COURT: What is the case?

MS. SULLIVAN: The case is *Zdziech v. DaimlerChrysler Corporation*.

THE COURT: The cite?

MS. SULLIVAN: The cite is 114 Fed.Appx. 469, 2004.

THE COURT: Okay. Thank you.

MS. SULLIVAN: And in that case the defendant placed Zdziech on a disability leave. This is what the Court said, "This act, Zdziech argues, constituted unlawful

discrimination." He filed a complaint that -- they did not reinstate him. During the period, it was about two years, he sent repeated requests to be returned to work so kind of similar to what's happening here, which were either refused or ignored. And the Court said very clearly, "We agree with the judgment of the District Court that Zdziech's rights under the ADA fully ripened on October 27th, 1998, when DaimlerChrysler placed him on disability leave."

And the Court said that, "The repeated refusal of an employer to..." bring someone back, that that is not an independent -- it's not like a continuing violation like you might think of in some other kind of case -- "...does not give rise to a new claim of discrimination," and if it did, that would eviscerate the statute of limitations.

So that would be our argument, that the only way that they were able to overcome these cases and cases like this. There is one from the Fourth Circuit that's similar. It's not exactly the same because it wasn't a disability leave. I think it was a termination. But that case is *Martin v. Southwestern Virginia Gas Company*, 135 F.3d 307, 1998. Very similar, it talks about eviscerating the statute of limitations. But the way that they were able to get around that was that by pleading that they weren't aware that there was a cause of action on May 18th. We don't find that believable in any way, particularly given the mountain

of other evidence in the case, that we tried to depose the plaintiff and Mr. Friedman on, and we were not given any -- we weren't able to get any responses to that.

THE COURT: Let me go back to my question, though, and if you can try and answer it, is if Mr. Friedman didn't communicate a belief or some fact or some knowledge that he had to her, why is any of that relevant, that he held beliefs or opinions? So to the extent you are seeking discovery about information that he did not pass on to Ms. Aviles, why is it relevant? If it's not relevant, then you don't get discovery on it.

MS. SULLIVAN: No, I didn't mean to suggest that. I think he probably did pass it on to her.

THE COURT: I'm saying if there are opinions and/or facts that he knew, or conclusions that he reached, do you seek discovery of those if he did not, in fact, pass them on to Ms. Aviles?

MS. SULLIVAN: I think I do because otherwise -- well, if he didn't -- but he still advised her to sign the release, then I think there is a bigger issue. It's still the same result, that he advised her not to sign the release -- I mean, to sign the release. And so I assume that he explained to her -- I just don't know. So if he formed some opinion that he never shared with her --

THE COURT: I mean, attorneys think about lots of

things and strategize about lots of ideas, and at least part of the concern of the opinion work-product doctrine is, is that really what's going on in the attorney's head should be sacrosanct unless, of course, it's waived. But, otherwise, particularly in the Fourth Circuit, the cases talk about that it's nearly sacrosanct, that there may be extraordinary cases in which you can get discovery of that.

Certainly, waiver would qualify and open the door, but I guess the question I have is if he never passed on some of these thoughts that you want to ask him about to the plaintiff, I'm not sure why you're entitled to discover that in this case.

MS. SULLIVAN: As opposed to?

THE COURT: Because what's significant is what she knew or reasonably should have known with respect to any adverse employment action.

MS. SULLIVAN: Well, Your Honor, I agree with you for the most part. However, I think this is that exception because I think that by putting in his reasonable beliefs and his conclusions into that amended complaint in order to survive the motion to dismiss, and in making the arguments that they made in their motion to dismiss, that that takes it out of the normal circumstances. It's that he concluded -- I mean, especially the May 21st one. It doesn't even say plaintiff concluded. It says he concluded.

I think we are entitled to understand why he concluded that, particularly when the weight of the evidence, which I will go through, is contrary to that.

So I think that's the difference. In the motion to dismiss, or in their opposition to the motion to dismiss their whole thing was plaintiff and her counsel did not become aware of plaintiff's claims until after plaintiff signed the release. That's on page -- that's it. That's in their motion to dismiss.

They also argued that they were unaware of the claims until after May 18th. I think that's the difference. There is even a section in their brief that says that defendant, including me personally, which I will not discuss, engaged in misleading conduct that caused her to unknowingly to, in effect, abandon her claims.

All of that, Mr. Friedman, in pleading that amended complaint, has interjected himself into all of this, and the Court relied on those paragraphs. So I think that's the main difference. There aren't a whole lot of cases that deal with these issues, because, thankfully, they don't come up that much.

But there is a case that we've cited a number of times, and it's not -- it's a Federal Court in West Virginia. But it's that *JJK Mineral* case. In that case the Court said, "Good faith belief is a state of mind. Swiger

alleges that he received and relied on the advice of the Daniels Law Firm with respect to suing JJK in state court." Because basically sort of a similar situation where JJK went -- there was a full release between these two parties, and then this plaintiff -- well, not the plaintiff in this case -- sued again, and so the issue was what was the good faith belief for being able to bring that when you had the release. So kind of a similar issue.

This case is good because it's relatively recent, and it goes through a lot of the positions on the different kinds of work product and privilege and what the courts have said. And in this one the Court said -- it goes into great detail about opinions and lots of cases, but it says, "Fundamental fairness compels the conclusion that a litigant may not use reliance on advice of counsel to support a claim or defense as a sword in litigation, and also deprive the opposing party the opportunity to test the legitimacy of that claim by asserting the attorney-client privilege or work-product doctrine as a shield. This court joins those courts that have held the defendant, having waived the privilege by asserting the advice of counsel defense, must produce not only attorney-client communications, but also all documents relied upon or considered by counsel in rendering the opinions."

Again, while this is not a straight up advice of

counsel defense because, obviously, they're not the defense, they are the plaintiff, we believe that it is a very similar situation, and the Court goes on at length again at the back, "Good faith belief is a state of mind." And that's, since he pled that that, "JJK must be able to discover the information that was conveyed by Swiger to counsel and vice versa, discover what facts were provided by Swiger to the Daniels Law Firm; discover what facts the Daniels Law Firm may have obtained from any other sources other than Swiger; discover the legal research conducted by and considered by the Daniels Law Firm; discover the opinions of the Daniels Law Firm gave Swiger," and it goes on and on, and it says you can't selectively ignore any of the facts or opinions because that's the crux of the allegations in this case. And they used it to say the reason that we filed, even though we had a release, is because of counsel's good faith belief.

While the amended complaint doesn't say good faith belief, it certainly says concluded, it certainly says reasonably believed, and it certainly says accepted my representations. That's all counsel, not Ms. Aviles. So that case is very comprehensive. I wish it were in the Fourth Circuit, but -- or, actually, I guess it is. It is West Virginia. It's not a Fourth Circuit opinion, but it's a District Court opinion, and it's pretty comprehensive.

The other privilege cases that we cited, the waiver cases, again *JJK*, the *Hearn v. Rhay* case, that was a criminal case but it's an older case that goes for that whole proposition about you can't place information at issue and then deprive the opposing party of something that's critical to its defense.

The *Brown University v. Tharpe* case, that's EDVA 2012, 2012 Westlaw 12894480, that one kind of goes to this issue of it doesn't have to be advice of counsel. There is an advice of counsel that happened here, and deposition questions were not answered because of that. But that Court calls it the at-issue waiver, and I really think that's what we should be referring to it here.

In that case it talked about the state of mind of the attorneys, and in that case they didn't find a waiver, but the legal principles in it are important, and they also talk about work product and that that too can be waived.

So we have, in our papers, we listed the document requests. It was document request 21.

THE COURT: Let me ask you about that.

MS. SULLIVAN: Yes.

THE COURT: So I have a question about 21 and 25. With respect to 21, this kind of goes back to what I was asking before, but why is it relevant whether Mr. Friedman accepted your March 13th representation about acting in good

faith and giving her sort of another bite of the apple with respect to a doctor's opinion? Whether he accepted or not, what's the relevance of that? How does that tend to make any fact pertinent to this case, you know, more or less likely?

MS. SULLIVAN: Well, that's the whole thing, is that they are trying to make this their -- they have argued and they are trying to make it that they believed we were -- he believed, he accepted what I said, which, of course, again, not going to get into what I actually said, but they are using this to overcome -- all three of these paragraphs -- to overcome a motion to dismiss because -- as to why they believe, he believed, he advised her, that the cause of action didn't accrue because they didn't think they had one. They weren't aware of one. That's all part of his saying that, you know, I will give you -- he used accepted my representations versus reasonably believed or concluded because the other two, I think, are a little stronger. But that's all part and parcel with the other ones as to why they're claiming that there was this grand charade and that the cause of action didn't accrue until later.

THE COURT: So you're saying, in essence, that that information arguably rebuts the claim that the adverse employment action occurred in February?

MS. SULLIVAN: Yes. That's the whole thing that

they were trying to get around because, you know, especially the cases that I was reading you, the one from the Third Circuit and the Fourth Circuit, the adverse action did occur in February. We believe, and we argued in both motions to dismiss, that everything was barred by that full release she signed in May.

All of these additions were added to get around that motion to dismiss to say, wait a minute. We thought we were going to have some other deal. We thought you were going to bring her back, and so, therefore, we can't -- May 18th, the cause of action accrued after May 18th.

THE COURT: All right. Let me ask you about request number 25. Just one second. I want to find the place in plaintiff's brief where they suggest how that particular request could be narrowed.

So plaintiff suggests it should be limited to documents, to the extent I find any waiver of privilege or work product, that counsel believed or advised plaintiff that claims had accrued or would be waived or not waived by her signing.

What is your position if the Court narrows the request along those lines? Because I'm not sure what you're seeking in number 25, but it seems very broad, to say the least.

MS. SULLIVAN: Could you read one more time, Your

Honor, the suggesting, the narrowing you're suggesting?

THE COURT: Yeah. So they suggest that what you really want here are documents concerning what counsel believed or advised plaintiff concerning whether claims had accrued or would be waived or not waived by her signing the release.

MS. SULLIVAN: Yes. That's the crux of what we would be seeking to obtain.

THE COURT: So you don't have any objection to narrowing that request if the Court even grants your motion?

MS. SULLIVAN: Well, I would also -- I mean, there are -- the other issue here that's included are documents relating to her and her counsel's decisions: One, to sign it; and also not revoke it. Because that also is a critical inquiry, because she had seven days to revoke the release, and the allegations, especially in Paragraph 67 said, "After May 21st, Mr. Friedman concluded that BAE acted to exclude plaintiff from the shipyard..."

Now, he wouldn't answer when after May 21st or why or anything like that. But she had seven days to revoke that release, and so if it was May 21st, we believe that if there was no -- that his communications with her and his state of mind as to that is just as relevant as why she signed it on the 18th.

THE COURT: Why is the revocation or potential

revocation of the release important? Maybe this is a case where she could have her cake and eat it too. She settles the first case, resolves that matter, but she has a claim that arises after. What would necessitate her revoking the release, learned that after the 18th that she had another claim?

MS. SULLIVAN: She could have revoked that release and not been paid the consideration, and if she had done that, we wouldn't be here because the class action settlement -- it was a separate supplemental release. I mean, it was for all claims. She could revoke the release for any reason. So she became aware on May 21st that she had a cause of action and she wanted to sue on it instead of getting, you know, the substantial sum of money that she did, she could have done that, but she didn't.

THE COURT: She didn't need to if the claim arose after the 18th, right? She wouldn't have any need to revoke her prior release and settlement.

MS. SULLIVAN: She, yes. Yes. If she truly believed that, which we don't believe, but if she truly believed that it happened -- we don't know what Josh, Mr. Friedman, or when he believed it. So when he said after May 21st, we don't know why and we don't know when, we just know it was after May 21st, so, yes, if something completely separate had happened, which it didn't, then, yes, she

wouldn't have had to revoke the release.

THE COURT: Because request 25 calls for all documents relating to the execution of the agreement and the release, presumably.

MS. SULLIVAN: Yes.

THE COURT: I'm not sure that that would encompass the release in any event.

MS. SULLIVAN: The release?

THE COURT: The revocation of the release, I apologize.

MS. SULLIVAN: Well, we did ask for documents relating to her decision not to revoke the release.

THE COURT: Okay.

MS. SULLIVAN: So some of the things -- I mentioned earlier that there is a lot of evidence in addition to the fact that he put these things in the amended complaint and relied on them and used them and used his state of mind; there are e-mails, there are documents that we tried to examine plaintiff or Mr. Friedman on that we believe directly refute these allegations that there was some sort of agreement or that the cause of action did not arise, and there are many of them.

One of them is a March 1st e-mail to me, and that March 1st e-mail from Josh Friedman says things like, again, this is well before the May 18th -- it says, "Morales,"

that's the doctor and her longstanding physician, the one that put her out of work, "and Rapaport" -- that is the previous workers' compensation attorney, who is now a judge on the workers' compensation commission so he's not representing the company anymore -- "collaborated to get Ms. Aviles off BAE's books." That's on March 1st.

There is also evidence of retaliation. There are men who are non-plaintiffs, who are working productively in 620 with the same restrictions or worse than Ms. Aviles has. We weren't able to understand any of his state of mind as to why he would write those things if there were no cause of action.

There is an April 29th e-mail from Josh Friedman to me that says, "The consequences of failing to keep your word are foreseeable. You made me look like a fool, and clients do not listen to fools. Janet will insist reasonably that her counsel abandon what she will now perceive as a long, drawn-out farce and ask the District Court to put her back to work. Since there is no non-discriminatory reason at this point to continue to keep Janet out of work, that is likely the result of such request."

There is a May 2nd e-mail responding to me when I said that I needed to consult with Bob Rapaport: "I do not have time to write a comprehensive response. I will on Monday. It will be addressed to the Court. Whatever

weaknesses you believed that a TRO would suffer from, BAE has cured them by putting Janet through this charade." That is on May 2nd, he is talking about charades, and, yet, it's not the exact same language but it sure does end up right there in the amended complaint that it was a charade.

There is a May 6th e-mail that I sent him forwarding a letter from Bob Rapaport to Ms. Aviles' workers' compensation counsel, because I realized that Josh Friedman was not copied on it, and in that May 5th letter from Mr. Rapaport to Ms. D'Angelo, Mr. Rapaport says, "I do not feel either safe or comfortable advising the yard to return Ms. Aviles to work given what I have received from Dr. Gershon." That's May 6th. Then it goes on and on like this all before May 18th.

THE COURT: That all goes really to the merits.

MS. SULLIVAN: But we weren't able -- we tried to ask questions about these things, and they objected on both work product and privilege.

THE COURT: Let me ask you about that. So if I find a waiver of the attorney-client privilege and work product, is there either some kind of relevance or policy limitation that the Court can graft upon that waiver to ensure that this deposition goes forward in some kind of reasonable fashion and gets that information that really is relevant to the dispute rather than prying, perhaps

unnecessarily, into every thought that Mr. Friedman may have had about the case, regardless of whether he's communicated that to Ms. Aviles?

MS. SULLIVAN: Right. Well, I think there may be, with some instructions like that, and knowing that you're available if the deposition is reopened, that you're available to call if we don't stick to your instructions, I think that would be a reasonable way to do it.

We have also, in the second motion we filed, and we filed the first motion before her deposition on the documents, and then during the deposition -- we didn't -- the waiver issue was -- I think my partner had called you but that's kind of a big issue to discuss just over the phone with no -- so we supplemented.

THE COURT: That was my conclusion.

MS. SULLIVAN: Yes. But we supplemented with all of the deposition questions that we believed she should have answered. So they are in the brief. If there were a way to craft that we stick to that, I'm certain that we could do that. I would want to take the depositions with the documents, and I think there may be a way to do that as an initial step, because what happened was we didn't even get the privilege log until after these depositions took place.

I think we mentioned in our papers a little bit about the privilege log. The entries there are sort of all

the same, but they clearly show where they are claiming privilege, and I think we could probably fashion something as to the production of them. The other thing is, if you were worried about just some sort of not having enough -- there are attorney-client privilege issues, but there are cases about reviewing them *in camera* first, and maybe you could set some ground rules after that if that were something that you wanted to consider.

One of the cases talks about the standards for reviewing *in camera*, and I think that's clearly met. So that's something that you could do.

THE COURT: Clearly not met, what do you mean?

MS. SULLIVAN: The *Brown v. Tharpe* case, that was the EDVA case from 2012. That one the Court, before it issued it's opinion, had reviewed *in camera*, and they said that the standard for whether it could be a review *in camera* is that the party invoking an exception to the privilege must make a threshold showing of a factual basis adequate to support a good faith belief by a reasonable person that an exception to the privilege replies. Once this threshold is made, a judge can review them *in camera* to assist in determining whether an exception applies.

I think with the allegations in the complaint and the opinion on the motion to dismiss and the fact that very clearly had those allegations of conclusions and state of

mind of counsel not been pled, I think we probably would have prevailed on our motion to dismiss. So it's definitely relevant, it's definitely relevant to a major defense in our case. We, of course, have other defenses, as well, but this one is a threshold one that is -- I feel that we are just right back where we started with the motion to dismiss.

THE COURT: All right. Thank you, Ms. Sullivan. Let me hear from Ms. Schuetz.

MS. SCHUETZ: Thank you, Your Honor. I think part of what is confusing in defendants' briefing is that defendant, even now, is not distinguishing among the different standards for the different types of materials that it is seeking. So I want to frame our discussion that way. We are talking about attorney-client communications, fact work product and opinion work product.

A different standard applies to obtain each of those things that are privileged.

THE COURT: With respect to that, I don't want to cut you off, and we can discuss those standards, but if I find waiver with respect to those items, then we are done, right? I don't have to get to the standards?

MS. SCHUETZ: I think, Your Honor, not exactly. I think I would say each of those can be waived, but as you were discussing earlier, what it's going to take to show they were waived is a little different for each of them

because if you're not pleading an attorney-client communication, then you're not going to waive that privilege, for example, if it helps.

THE COURT: Fair enough. Go ahead. Continue.

MS. SCHUETZ: Sure. So I want to say, first off, on top of what we've discussed so far, plaintiff lodged other objections to these discovery requests, relevance and proportionality, and defendant did not confer, per Rule 23, about those objections and then did not address them in its briefing. So we've raised that a few times but those are, in fact, a completely independent, different basis to deny the first of their two motions at issue today.

So as for these three categories of information, this is what I want to focus on. Attorney-client communications are the first thing. And to show there has been a waiver of an attorney-client communication, the defendant has to prove plaintiff is relying on an attorney-client communication and advice of counsel to prove an element of a claim or a defense or to disprove an element of a claim or a defense.

So that's the at-issue waiver. Plaintiff has to put it at issue, a communication at issue by disclosing or describing it in order to prove something. So defendant has two problems with showing that here. First of all, there is no attorney-client communication anywhere in the complaint

paragraphs defendant is citing. Your Honor has already noticed and pointed that out.

THE COURT: I asked a question about that. I haven't concluded that that's not the case.

MS. SCHUETZ: Okay, Your Honor. Well, certainly, plaintiff's position is there is no communication described in these paragraphs. It's literally, 31 is Mr. Friedman accepted this thing, which as was discussed earlier, is the description, basically, of his state of mind or a belief but says nothing about any communication between him and the client.

Number 37 is about each of their beliefs but not saying anything about who communicated anything to anyone else. Number 67, again, is just something about a conclusion counsel drew, not mentioning anything about a communication.

So I think, honestly, that's actually, as a threshold issue, that's enough to deny the whole thing as far as the attorney-client communications go. You haven't described one, then you haven't put it in issue.

THE COURT: Let me ask about that.

MS. SCHUETZ: Yes.

THE COURT: If Mr. Friedman is plaintiff's proxy, and he is engaged in this interactive process with defendant, and you've pleaded these types of conclusions in

there, at least one inference from that, from your argument about asking the Court to draw reasonable inferences in opposition to the motion to dismiss, is that what he learned he passed on to and communicated to the plaintiff?

MS. SCHUETZ: Well, Your Honor, that's something that could be speculated about but that's not the same as pleading a communication, and we are going to prove something in the case. I mean, there is obviously an assumption we could all make that every party is relying on the advice of their counsel or talking to their counsel about their claims at all stages of litigation.

But that doesn't mean that the party has waived the attorney-client privilege. So, for example, somewhere in defendants' briefing they say, well, we asked counsel at deposition, and she said she consulted with her counsel with regard to signing the release. Well, in the same way, we deposed a 30(b)(6) witness for defendant, and she said, well, yes, I consulted with counsel surrounding our decision whether to kick the plaintiff out of the shipyard. So just because she says that, just because we are aware that each party is consulting with counsel doesn't mean that they have waived the attorney-client privilege with respect to that decision any more than that plaintiff has.

THE COURT: I understand your position. I guess the difference is they haven't indicated at length sort of

what counsel was thinking and doing and believing and concluding in support of a claim that her claim accrued after May 18th.

MS. SCHUETZ: So that is my next point, Your Honor. So maybe we should talk about it. Plaintiff has not done that. That's not what plaintiff is doing. So there are, indeed, mentions of counsel's state of mind in the complaint, and essentially those are extraneous. They are irrelevant.

THE COURT: Well, but clearly somebody thought they were important enough to put in the amended complaint and that the original complaint needed this information, perhaps, to survive the motion to dismiss. So do you dispute that plaintiff added those three paragraphs to support her argument that her claims arose after she signed the settlement and release?

MS. SCHUETZ: I think there are parts of those paragraphs that are relevant to a possible equitable estoppel argument, and that might be part of what that's about. I didn't draft the complaint so I can't tell Your Honor, obviously, this is what I was thinking when I did it.

But, no, I mean, primarily plaintiff's argument is that the claims accrued after that date because this is a reasonable accommodation case, and the cases that defendant was citing, I think, were not. I'm not sure, Your Honor. I

don't have my computer so I can't pull them up and look.

But on Page 15 of plaintiff's opposition to defendants' first motion to compel, in note 8 you will see a few cases explaining when claims would accrue in a reasonable accommodation case.

THE COURT: Isn't it that when the plaintiff knew or reasonably should have known of the adverse employment action that forms the accrual?

MS. SCHUETZ: That's true, Your Honor, except that the adverse employment action is not just the initial removing from the shipyard. So the issue is in a reasonable accommodation case where there is a back and forth about whether or not the plaintiff can be accommodated, "The discrete discriminatory act" -- this is the language from this case *Faircloth* -- "occurred when it was clear that no accommodation would be made, not the day on which plaintiff was placed on medical leave."

So basically what we have in this case, and what was actually the basis of the Court's decision on the motion to dismiss, was the fact that there was a continuing back and forth between the parties long after May 18th. They were still sending information back and forth, medical records to each other, including on May 21st, a couple of days after the date of the signing of the release, when one of defendants' attorneys wrote to plaintiff's counsel and

said, I need to know which of plaintiff's accommodations she is willing to do without in order to return her.

So there is not a certainty about the outcome of the interactive process until well after the date of the release signing. That's plaintiff's primary argument as to why the claim hadn't accrued yet. And that is, in fact, what we argued in our papers in opposition to the motion to dismiss.

THE COURT: Certainly, the appearance is that you added these paragraphs in the -- I think I agree with you on the law, and those facts will have to be determined, about whether that process had sufficiently advanced to a point which the plaintiff knew or should have known of an adverse employment action.

So here, perhaps, there is this back and forth maybe creates some issue or dispute about that, but it appears that plaintiff amended the complaint to add this information about the attorney and thus kind of did two things: One, she's putting that information at issue with respect to when the claim accrued; and also to blunt, if you will, the defendants' affirmative defense that, hey, we had this contract that said she released everything, and then three days later her counsel's concluding that, no, she really hadn't and that she suddenly, a claim came to light.

How do you respond to that?

MS. SCHUETZ: Yes, Your Honor. Well, I think, again, I agree that it's weird that there is extraneous information in these paragraphs, but there is other information in the paragraphs that's relevant that's part of what is going on here possibly. If you look at, say, 37, it's talking about a belief, I agree, which, again, counsel's belief is not, in fact, relevant to anything here, but about written and verbal representations made by BAE's counsel.

So the way in which that could become relevant, Your Honor, is if defendant were able to prove that the claims accrued before the release was signed, which, again, we disagree with, then plaintiff could try to prove equitable tolling or equitable estoppel and basically argue defendant behaved in a deceptive way, therefore, the Court should permit plaintiff to bring this claim despite the fact that it accrued earlier.

But that's not contingent on the subjective state of mind of plaintiff or her attorney. Equitable estoppel or tolling is centered on the question, basically, what was defendants' conduct, because the question is what would somebody reasonably conclude if they were looking at what defendant was doing. Would they conclude defendant was acting in good faith or would they conclude defendant was basically trying to obtain something that it was unable to

negotiate in the course of the class action settlement by, you know, taking someone out of work on a pretext and then, saying, oh, well, now you've signed a release, we are not going to actually bring you back after all.

THE COURT: I understand your argument.

MS. SCHUETZ: Okay. The second category, Your Honor, of what defendant is seeking is opinion --

THE COURT: Let me back up a second, though. Let's say I accept your argument and that this information about what counsel fought and concluded and believed is irrelevant, what constraints, if any, would you have a Court place then on what counsel's role would be in this case going forward, then, Mr. Friedman's role? You've listed him as a witness. You say he wants to provide information about the interactive process, but at the same time you want to say, well, this stuff is really irrelevant and should be off limits because it is privileged or protected.

MS. SCHUETZ: Sure. You're right, Your Honor. I do think you are pointing to something that is always uncomfortable about attorneys as witnesses in cases. I think that what's causing the confusion here is Mr. Friedman was never listed as a witness to provide information about his subjective belief as to when claims accrued. That is not relevant. It's not something that plaintiff has put in issue in the case.

He was identified as a witness because he was in a conversation with defense counsel concerning a doctor who they would be seeking a second opinion from and what would be the procedure for doing that. So he's identified to testify as to his conversations with the defendant. In the same way, defendant has identified counsel, including Ms. Sullivan, who is present, as witnesses in this case, as well, to testify about those conversations between the parties.

THE COURT: All right. Thank you.

MS. SCHUETZ: Sure. So the second category of information defendant is seeking is opinion work product. That is nearly inviable under precedent in the Fourth Circuit. The cases are extremely clear it is only discoverable in extraordinary circumstances.

THE COURT: That goes back to my first question, which is if you've waived it, then by placing and pleading his opinions in the complaint, which you have, then doesn't that go out the window?

MS. SCHUETZ: It's conceivable that there could be a case where an attorney did waive opinion work product, but our contention is certainly that that is not what has happened here. Merely saying, basically, plaintiff's counsel felt that defendant had done something discriminatory, which is basically what these paragraphs

say, is the equivalent of what plaintiff's counsel might say to the press in a case like this.

You could have a plaintiff's attorney doing an interview and saying defendant discriminated against my client by putting her off of work, and we expect to prevail in the claims in this case. That's not a waiver of attorney opinion work product, which is the most sacrosanct category of privileged information in litigation.

Defendant really hasn't shown -- I mean, this is -- it's very ill-defined even what defendant thinks that something like that would encompass. I think the defendants' position appears to be that merely making the statement my client was discriminated against is revealing opinion work product and could potentially open up broadly maybe anything about the attorney's opinions about the case.

THE COURT: Well, I mean, is the waiver limited to the opinion that was expressed? In here, I mean, it's not simply not that he said the defendant engaged violative of the law. He is indicating on specific dates certain beliefs and conclusions to support the claim that your client's ADA claim did not accrue until after May 18th.

MS. SCHUETZ: Well, again, Your Honor, I think that comes back to the fact that, again, our position is that we are not relying on what he subjectively believed on those dates to show that the claim hadn't accrued. There is a

different basis for argument that the claim hadn't accrued, which is that the interactive process was ongoing. It was simply not ripe yet.

THE COURT: Well, let me ask you this: If I rule against you on the waiver issue in the case, if we look at plaintiff's deposition, if I allow her to be re-deposed and the work-product protection objections are gone, in whole or in part, can you foresee any additional concerns that the Court needs to address concerning plaintiff's deposition, should it be taken again?

MS. SCHUETZ: That raises a huge raft of concerns, Your Honor, including the fact that defendant hasn't even defined what questions it believes it's entitled to ask. It basically gives a couple of examples in its briefing. But it is incredibly ill-defined what is the scope of what defendant feels it's entitled to ask if all these things are waived.

Also, Your Honor, I guess I'm not sure when you're asking that question whether you are saying in this hypothetical that like the privilege with respect to all attorney-client communications and all work product, both opinion and fact has been found to have been waived or is something more narrow?

THE COURT: Well, let's play it out. Let's say that to the extent that there are communications between

counsel and plaintiff that go to the question of what she knew or reasonably should have known about when an adverse employment action occurred and/or that she was made party to or privy to fact or opinion work product that informs her state of mind with respect to that issue, that she could be asked about such matters?

MS. SCHUETZ: Well, Your Honor, I think one concern with that is I'm having trouble at this point distinguishing what makes that situation different from any reasonable accommodation case where plaintiff was represented by counsel during the course of negotiations with the adverse party.

I mean, it sounds like, again, based on, you know, the argument of defendants that would be excepted in that circumstance, that in basically every case where a plaintiff was represented and was presumably talking with her counsel about her reasonable accommodation claims, then the defendant could say, well, she's waived the attorney-client privilege with respect to those claims because she could have known at some earlier point, based on what her counsel said, that she had claims, and, you know, how do we know what counsel said unless we can ask her?

That is just not the law, and we've cited cases, reasonable accommodation cases where, you know, the courts have pointed out that kind of fundamental problem. I

also think that that opens up just kind of an astronomical amount of potential questions about basically any advice that counsel gave to plaintiff concerning her claims and would be extraordinarily difficult for practical purposes to limit, particularly given defendant didn't, you know, identify specific questions, basically, that it actually wanted an answer to other than giving a couple of examples.

THE COURT: Do you have any argument on defendants' claim that, whoever it was defending these depositions, engaged in inappropriate conduct with respect to the depositions?

MS. SCHUETZ: Sure, Your Honor. I think our papers do speak well for themselves regarding that subject, and I certainly would encourage Your Honor to go ahead and look at the deposition transcript, and it should be apparent on the face of it that those were not appropriation objections, but actually, Your Honor -- hold on one second. Just to give you a sense, Your Honor, of the fact that in this case, because it is a circumstance where attorneys are being deposed, which causes everyone generally a lot of discomfort and difficulty with dealing with privilege issues in real time, when defendants' counsel, Ms. Sullivan, was deposed, it was a very similar circumstance from Mr. Willner with regard to what types of objections he made and how much speaking he needed to do to confine her responses to

non-privileged subjects.

So just as an example, there were objections in her deposition from Mr. Willner, one of defendants' counsel, that says, "I'm going to object to the extent you're asking about what one counsel said to other counsel on the same side. I think what was being sent was privileged. The correspondence between Mr. Rapaport and Ms. D'Angelo is not privileged, and that had been produced. I think whether or not Mr. Rapaport said this to Ms. Sullivan is privileged. That's a communication between counsel to which no one else is a party, so I think I have to instruct the witness not to answer that question."

So that's obviously a long objection. Obviously, there are circumstances where that kind of thing could be a speaking objection, but basically that happened throughout the deposition because everyone was trying to figure out, okay, what is privileged in real-time. I think that is what you will see also with regard to the objections made in the deposition of Mr. Friedman.

THE COURT: I guess the concern the Court had is that it's not appropriate to filibuster during these depositions, and I do understand that when an attorney is being deposed and taking and/or defending such a deposition that it's stressful and people need to be very careful about what is and is not said, but it strikes the Court that if

there is to be any continued deposition of Mr. Friedman, that it's going to be very important to prep him in advance about what is and is not allowed consistent with any rulings that the Court may make in the case and not have this sort of running sort of narrative and interrupted answers and those kind of constant filibustering.

It seems to me, and I think when you ultimately get to the end of a lot of these objections, they arguably were reasonably asserted. But the problem is, is that there was just so much back and forth and interjecting that instead of saying, objection, that calls for work product information, there is ten pages of transcript arguing about it.

To a certain extent it's both counsel, but if there is going to be a future deposition, the Court will not look favorably upon that kind of filibustering in the future, quite frankly. I think that's an important message to send and deliver.

MS. SCHUETZ: Your Honor, with regard to fact work product, which is the third category of privileged information defendant is seeking, defendant, in addition to basically asserting just the same waiver argument on the basis of these couple paragraphs of the complaint, says in a conclusory manner that also it should be able to obtain these things through a showing of substantial need and inability of that undue hardship to obtain substantially

equivalent material, and I just wanted to point out, Your Honor, that that is a completely conclusory argument.

Defendant has not explained why they need something, why they can't get it from somewhere else, other than purely by reference back to the idea that this is in the complaint and they should be entitled to get it because it's in the complaint.

I do want to point out also, Your Honor, defendant has claimed that plaintiff relied over ten times on these things in opposition to the motion to dismiss, and, in fact, Paragraph 67 is not actually cited anywhere in plaintiff's opposition to the motion to dismiss that I can find. The other two are only referred to twice in a general manner.

So I think defendant is trying to create a much bigger -- to blow something that is really basically a couple of irrelevant paragraphs, a couple of extraneous information in a complaint, into something that is much more substantial.

THE COURT: With respect to they haven't explained why they need it, wouldn't you agree that the only place they could get information about plaintiff's state of mind is from plaintiff, to the extent that you have indicated that she believed that the interactive process, it was continuing in good faith and arguably believed that because counsel had communicated that to her as of May 18th when she

signed the deposition?

The only place they could get that information is from the plaintiff herself and/or from communications made by Mr. Friedman to the plaintiff about what she knew or reasonably should have known about the status of any adverse action against her.

MS. SCHUETZ: That's correct, Your Honor, with sort of two limitations: One being that they did get to ask the plaintiff about her state of mind, I mean, a separate question from whether they could ask the plaintiff about her communications with counsel, that, they could not do. But they asked, you know, do you have any documents reflecting plaintiff's state of mind that are not privileged, and we agreed to give them that if there were any. There aren't. But that was not an objection that we made in our discovery responses. Secondly, that they -- I'm sorry, Your Honor. I'm actually losing the point.

THE COURT: I think you answered my question. So is the privilege log, is that the universe of documents that are potentially responsive to the four production requests?

MS. SCHUETZ: Yes, Your Honor. We have served a privilege log. There shouldn't be anything unlogged.

THE COURT: Very well. Thank you, Ms. Schuetz. Unless you have anything further?

MS. SCHUETZ: No, Your Honor.

MS. SULLIVAN: Briefly?

THE COURT: You may.

MS. SULLIVAN: Thank you, Your Honor. Okay. Just a few points. I don't want to belabor things, but the representation that we are blowing something out of proportion, that there is irrelevant information into the complaint, that this information was irrelevant, is, frankly, very curious argument. The argument that this was like talking to the press, my client was discriminated against, we don't see it that way at all. It's not just in the complaint. It is in the motion to dismiss: "On May 18th, 2015, Ms. Aviles and her counsel reasonably believed, based on the written and verbal representations of BAE's counsel that" -- and it goes -- that's the same exact thing from Paragraph 37, "The reasonable inference to which plaintiff is entitled is that her retaliatory termination claims accrued after she signed the SA and the release, and, therefore, could not have been waived."

This is not extraneous, this is not irrelevant information material, particularly when you look at the timing of how it was inserted after we filed our first motion to dismiss. So I take great issue with that.

A couple of other things. Again, I think that the case law, particularly on the ADA, and when something accrues, and if you're just affirming, reaffirming a

decision that was made, that is not an independent decision. However, even if we take opposing counsel's argument that it doesn't end until the interactive process ends, that's only one of the claims in this case.

There is two Title VII causes of action, and that's retaliation and gender discrimination. Just based on the documents that we obviously weren't able to ask Mr. Friedman about, the *Delaware College v. Ricks* case, it's when an adverse action is communicated to a plaintiff. In that case, that's a Supreme Court decision. I think I have the cite.

THE COURT: That's fine. I have it.

MS. SULLIVAN: You know that one. But that one was where they were told you're going to have to go, and there was a whole grievance process and lots of things happened afterwards. The Court said no, it's when you learned of the adverse action. So there is an ADA claim, certainly, but there are two other claims in the case, too, and we are entitled to defend on those claims as well.

I think those were my main points in response. Talking about the filibustering during the deposition, and I know it's in our papers, and I won't go on about it, but there were times when opposing counsel interrupted Mr. Friedman when he was getting ready to testify about his discussions with me, and it was clearly coaching, and it

kind of shut down that.

I know we put the transcript in, but I do think that it very much elongated the depositions, and in plaintiff's deposition, we actually ran out of time, and they walked out because we had been on the record for seven hours, and we weren't finished. So I just wanted to respond briefly on that.

Do you have any questions for me?

THE COURT: I don't think I have any further questions, no.

MS. SULLIVAN: Thank you.

THE COURT: All right, counsel. Thank you for your arguments today. The Court is going to take this matter under consideration. We will issue a written ruling, and we will see where we go from there. I would like to chat with counsel in chambers briefly after this, if you will come back around, go out that door and come around and go down the long hallway. I want to follow up on one issue that has nothing to do with these motions.

MS. SULLIVAN: Sure.

THE COURT: Thank you.

(Hearing adjourned at 12:18 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

X_____/s/_____x

Jody A. Stewart

X_____11-8-2017 _____x

Date